

REMARKS

In response to the Final Office Action mailed August 16, 2011, Applicant respectfully requests reconsideration and examination of this application, withdrawal of the rejections outlined below, and the timely allowance of the pending claims.

I. Status of the Claims

Claims 35-37, 40-42, 44-63, and 65-78 are pending and examined in this application. Without prejudice or disclaimer, claims 62, 64, and 68 are canceled; and claims 35, 36, 52, 58, 63, 69 and 78 are amended. Withdrawn method claims 79, 80, 82, and 84 are also amended for consistency with the amendments made to the elected claims, in order to be eligible for rejoinder. Exemplary support for the amendments can be found throughout the specification as-filed. Accordingly, no issue of new matter or written description is raised by this amendment.

As discussed during the December 1, 2011 interview, the Office Action and the Applicant's response to the December 17, 2010 Office Action erroneously referred to claims 52-61 as "Withdrawn." The Office and the Applicants agree that the mistake was one of form and not of substance and Applicant has corrected the claim status indicators in this response.

II. Statement of Substance of Examiner Interview

Applicant thanks Examiner Haejin Park and Primary Examiner Robert Wax for the courtesies extended to Applicant's representatives during the helpful telephonic

interview on December 1, 2011. As result of that discussion and a further study of the case, Applicant files this Amendment and Response.

III. Rejection of Claims under 35 U.S.C. §103

A. Claims 35-37, 40-42, 44-63, 65-76 and 78

Claims 35-37, 40-42, 44-63, 65-76, and 78 stand rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over WO 01/19333 to Bitler et al., ("Bitler") in view of EP 1034776 A1 to Tournilhac ("Tournilhac") as evidenced by U.S. Patent No. 5,156,911 ("Stewart") for the reasons set forth in pages 3-11 of the Office Action.

The Office asserts that Bitler teaches Side Chain Crystalline (SCC) polymers having melting temperatures ranging from 29-48°C, and that Bitler does not expressly discuss incorporating a colorant, volatile oil, or a liquid fatty phase structured with an SCC polymer having a melting temperature of at least 50°C. *Id.* at 5. The Office relies on Tournilhac for the teaching of cosmetic compositions comprising a liquid fatty phase and a semicrystalline olefin (i.e., crystallinity from 5 to 40%), a coloring matter, and a volatile oil such as isododecane, and that the olefin taught by Tournilhac has a melting point lower than 150°C, preferably lower than or equal to 110°C. *Id.* Thus, the Office concludes that it would have been obvious to one of ordinary skill in the art, at the time the invention was made, to combine the teachings of Bitler and Tournilhac and prepare cosmetic compositions comprising liquid fatty phases structured with SCC polymers having melting temperatures of less than 50°C and above 50°C because both Bitler and Tournilhac are drawn to oil-containing compositions comprising partially crystalline polymeric thickeners that are also safe and effective for cosmetic use. *Id.* at 7. The

Office further states that Bitler teaches using SCC polymers with widely ranging Tp that is 20 degrees Celsius above the temperature of use, and one of ordinary skill in the art would appreciate that using an additional SCC polymer with Tp of 50°C or greater would allow preparation of compositions that are able to withstand higher storage and processing temperatures. *See id.* at 9.

Applicant respectfully disagrees and traverses the rejection at least for the reasons of record. However, by this Amendment, Applicant has amended independent claims 35 and 78, which are the only independent claims included in this claim rejection. Consequently, Applicant respectfully submits that a prima facie case of obviousness with respect to the subject matter recited in amended independent claims 35 and 78 has not been established, for the reasons below.

A claimed combination of prior art elements may be non-obvious where the prior art teaches away from the claimed combinations and the combination yields more than predictable results. 75 Fed. Reg. 53643, 53647 (Sept. 1, 2010) (discussing *Crocs, Inc. v. U.S. Int'l Trade Comm'n*, 598 F.3d 1294, 1309-10 (Fed. Cir. 2010.)) Applicant submits that neither Tournilhac nor Bitler, independently or combined, teach the all the elements of the present claims. For example they fail to teach at least one liquid fatty phase structured with a mixture of at least one semi-crystalline polymer having an organic structure selected from low-melting polymers that have a melting temperature of less than 50° C, and at least one semi-crystalline polymer having an organic structure selected from high-melting polymers that have a melting temperature of at least 50°C, wherein the semi-crystalline polymers are side chain crystallizable polymers, and further wherein the ratio by weight of the low-melting point polymer to the high-melting polymer

ranges from 50/50 to 90/10, and further wherein the total amount of the polymer mixture in the composition ranges from 15% to 80% by weight, relative to the total weight of the composition.

In addition, MPEP § 2143.03(VI) states that "[a] prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention." (emphasis added). Accordingly, a reference that teaches away from a claimed feature, is not available for the purposes of an obviousness rejection. In the instant case Bitler not only fails to teach or suggest a make-up composition with the claimed polymer mixture in the amount claimed, but actually teaches away from the amounts of polymer of the present claims. Specifically, the Bitler disclosure, which is merely directed to the use of polymers as thickeners of oil-containing compositions, teaches in relevant part that "[t]he amount of the polymeric thickener preferably used varies with the application. It is usually unnecessary for the amount of the thickener to be more than 10% of the total composition, and smaller amounts such as 2 to 7% in compositions which are free of water, and 0.5 to 5% in water-in-oil emulsions, are often effective." Bitler at p.6, l.30- p.7, l.2.

Accordingly, Applicant submits that the Office has failed to establish a prima facie case of obviousness because Bitler fails to disclose at least three elements of the present claims (1) at least one liquid fatty phase structured with a mixture of at least one semi-crystalline polymer having an organic structure selected from low-melting polymers that have a melting temperature of less than 50° C, and at least one semi-crystalline polymer having an organic structure selected from high-melting polymers that have a melting temperature of at least 50°C, wherein the semi-crystalline polymers are

side chain crystallizable polymers; (2) the ratio by weight of the low-melting point polymer to the high-melting polymer ranges from 50/50 to 90/10; and (3) the total amount of the polymer mixture in the composition ranges from 15% to 80% by weight, relative to the total weight of the composition. Moreover Bitler's teaching that "[i]t is usually unnecessary for the amount of the thickener to be more than 10% of the total composition" teaches away from the compositions and ratios of the present claims.

Tournilhac and Stewart fail to cure these deficiencies, as neither reference teaches a polymer mixture according to the present claims, or a reason to combine its teachings with those of Bitler. Therefore, the Applicant respectfully requests withdrawal of this rejection.

IV. The Office Improperly Assessed the Auguste Declaration

In addition, the Applicant submits that the Auguste declaration correctly compared the performance of a composition containing the side chain crystallizable semi-crystalline polymers according to the present claims (Composition 1) to a composition containing a main chain crystallizable semi-crystalline polymers having a polymer taught by Tournilhac (Composition 2) to show that one of ordinary skill in the art would not have expected that the use of side chain crystallizable polymers would have resulted in the markedly improved resistance to transfer compared to a main chain crystallizable polymer. Evidence of unobvious or unexpected advantageous properties, such as superiority in a property the claimed compound shares with the prior art, can rebut a *prima facie* case of obviousness. See M.P.E.P. § 716.02(A)(II). Accordingly, Applicant reiterates its position for the record that the submitted data further supports a case of non-obviousness.

V. Conclusion

In view of the foregoing remarks, Applicant respectfully requests entering of the claim amendments, reconsideration and withdrawal of the rejections, and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

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By:



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